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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

THE CITY OF BLACK JACK,
A Municipal Corporation, *et al.*,
Petitioners,

v.

BARBARA BATES, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Petitioners, the City of Black Jack, Missouri, and certain of its officials, pray that a writ of certiorari issue to review the judgment of the Court of Appeals for the Eighth Circuit entered in this case on August 28, 1979.

OPINIONS BELOW

The memorandum opinion of the district court is reported at 454 F. Supp. 1223 and is reproduced as Appendix A to this Petition at pages A1-A10. The opinion of the court of appeals is reported at 605 F.2d 1033 and is reproduced as Appendix B at pages B1-B14.

JURISDICTION

The judgment of the court of appeals was entered on August 28, 1979. (App. C, p. C1, *infra.*) A timely petition for rehearing was denied on October 3, 1979. (App. D, p. D1, *infra.*) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

A municipality adopted a zoning ordinance limiting new residential construction to single-family dwellings. The ordinance was held to have a discriminatory effect, in violation of the Fair Housing Act, but was found not to have been enacted with discriminatory purpose or intent and was not held to violate the Fourteenth Amendment. At the time the ordinance was adopted, a low- and moderate-income, multiple-family housing project was proposed, but it has now been abandoned because it became uneconomical in the period consumed in good faith litigation of issues pertaining to the validity of the ordinance.

The question presented is whether a United States court, acting solely on the authority of the Fair Housing Act and the determination of a violation thereof based on a finding of discriminatory effect, may order the municipality to take affirmative steps to ensure the construction of low- and moderate-income, multiple-family housing equivalent to what would have been provided by the abandoned project.

STATUTE INVOLVED

Section 812(c) of the Fair Housing Act, Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §§ 3601 *et seq.*, provides:

> "The court may grant as relief, as it deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order, and may award to the plaintiff actual damages and not more than $1,000 punitive damages, together with court costs and reasonable attorney fees in the case of a prevailing plaintiff: *Provided*: That the said plaintiff in the opinion of the court is not financially able to assume said attorney's fees." 42 U.S.C. § 3612(c).

STATEMENT

The City of Black Jack, a community of 5700 persons living on 1700 acres in the suburbs of St. Louis, Missouri, was incorporated in August 1970. In October of that year, the City enacted a zoning ordinance limiting new residential construction to single-family dwellings. At that time, a multiple-family development called Park View Heights was planned for construction in Black Jack. Park View Heights, a project of the Inter-Religious Center for Urban Affairs (ICUA), was intended to provide 108 units of housing for low- and moderate-income families of all races, most of whom were expected to come from the City of St. Louis. The project, which was to be funded under Section 236 of the National Housing Act, 12 U.S.C. § 1715z-1, had received preliminary approval from the Department of Housing and Urban Development.

Two separate actions were brought in 1971 in the District Court for the Eastern District of Missouri challenging Black Jack's single-family dwelling ordinance. One of these actions was by the United States. In March 1974, the district court dismissed that action, holding that the ordinance constituted a proper exercise of the City's police power, was not enacted with a racially discriminatory motive, and did not have a racially discriminatory effect. *United States* v. *City of Black Jack*, 372 F. Supp. 319 (E.D. Mo. 1974). The court of appeals reversed. *United States* v. *City of Black Jack*, 508 F.2d 1179 (8th Cir. 1974). It held that the ordinance violated relevant provisions of the Fair Housing Act, Title VIII of the Civil Rights Act of 1968, because the United States had made out a prima facie case that the ordinance had a racially discriminatory effect and none of the reasons underlying the ordinance constituted a compelling governmental interest that would justify an ordinance having such an effect. The court of appeals left standing the district court's determination that enactment of the ordinance "was not due to racial motivation, purpose, or intent." 372 F. Supp. at 329.[1] A petition for a writ of certiorari was denied. 422 U.S. 1042 (No. 74-1293). The district court on the remand entered an order declaring the ordinance illegal and permanently enjoining the City and its officials from enforcing it. The court further ordered that the land zoned for multiple-family development before the ordinance was adopted revert to that zoning classification so that land within the City became and remains available for

[1] The district court based this finding on, *inter alia*, the fact that the ordinance was approved unanimously by the City's zoning commission, two of whose members were black. 372 F. Supp. at 324.

multiple-family development. In addition, the court directed the City to "affirmatively take whatever steps are necessary to permit the construction and occupancy of the propose[d] Park View Heights Development." (Pp. B8-B9, *infra.*)

The other action challenging the ordinance (the action that is the subject of this Petition) was brought by ICUA, the sponsor of the proposed housing project, the Park View Heights Corporation, the developer of the proposed project, and eight persons claiming to represent the class of prospective residents in the project. After resolution of preliminary questions of ripeness and standing,[2] the parties agreed to stay further proceedings pending final disposition of the United States action. While the United States action was on appeal, the parties further stipulated that they would be bound by the ultimate decision in that action on the question whether the ordinance violated the Fair Housing Act or the Constitution. (App. E, pp. E1-E2, *infra.*)

As noted earlier, the court of appeals eventually held in the United States action that the ordinance constituted a violation of Title VIII because it had a discriminatory effect but left standing the district court's finding that the ordinance did not have a discriminatory purpose. In pursuance of their stipulation, the parties to this case entered into a consent judgment in January 1976 whereby Black Jack paid the developer $450,000 damages. This judgment concluded the damage claims of all plaintiffs and the claims of ICUA and the developer for injunctive relief but left it open to the representatives of the class of prospective residents to seek further injunctive or declaratory relief. (Pp. A4-A5, *infra.*)

[2] *See* Park View Heights Corp. v. City of Black Jack, 335 F. Supp. 899 (E.D. Mo. 1971), *rev'd*, 467 F.2d 1208 (8th Cir. 1972).

After unsuccessful negotiations, the plaintiff class moved for an injunction ordering Black Jack to take measures "whereby it can reasonably be expected that, within a reasonable time, in the City of Black Jack, there will be available for multi-racial, moderate-income occupancy, at least 108 dwelling units." (P. B11, *infra.*) The plaintiff class argued that the increase in building costs since 1971 had made construction of the Park View Heights project economically infeasible, and that Black Jack was therefore obligated to take affirmative steps to provide substitute low- and moderate-income housing units in the City.

After a trial, held late in 1976, the district court denied plaintiffs' petition for relief in an opinion handed down in mid-1978. The court first noted that, under the order entered in the United States action in 1975, "[n]o legal or governmental impediments by the City of Black Jack exist to prevent the construction of a low income housing development on the land in question. Only the economics of the situation bars construction." (P. A5, *infra.*) Moreover, the court said, the order in the United States action, which included the direction that the City "affirmatively take whatever steps are necessary to permit the construction and occupancy" of the Park View Heights project, "provides all of the equitable relief that was requested in plaintiffs' complaints" (P. A5, *infra.*) There was no suggestion that the City had not complied with the 1975 order.

If, indeed, the Park View Heights project was now economically infeasible, the court went on, it was because of intervening circumstances that could not have been foreseen by the City when the ordinance was adopted. These included construction cost increases, many of them

resulting from new HUD and local building codes, and, most significantly, the unavailability of federal subsidy beyond the dollar amount that had been promised in 1970 because of a moratorium on new Section 236 projects. The court concluded that "the actions of HUD and some of the other economic factors which have destroyed the feasibility of this project constitute independent intervening causes of plaintiffs injury and are beyond the legal and equitable responsibility of the defendants." (P. A7, *infra.*)

The district court concluded further that, apart from all else, the relief requested by the plaintiff class was not within the equity powers of a federal court in the absence of a showing that the zoning ordinance violated the Constitution, citing *Hills* v. *Gautreaux,* 425 U.S. 284, 293 (1976), *Milliken* v. *Bradley,* 418 U.S. 717, 738 (1974), and *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 16 (1971). Noting that the parties had agreed to be bound by the outcome of the United States action, and that no constitutional violation had there been found, the court ruled that it was without power to grant the relief requested. (P. A9, *infra.*)

The court of appeals reversed. It concluded that the ordinance had caused the demise of the Park View Heights project, in the sense that the project would have been realized "but for" the ordinance, and it held that the district court "should not have relieved the defendants of liability because of the existence of intervening economic factors." It also stated that a rise in construction costs during the period of delay occasioned by the zoning ordinance "was both inevitable and foreseeable," disregarding the district court's detailed findings on that point. (P. B10, *infra.*)

The court of appeals also held, without serious analysis, that the district court erred in concluding that it lacked power to grant injunctive relief against a municipality absent a constitutional violation. (P. B10, n.5, *infra.*) The court finally ruled that the type of affirmative remedy requested by the plaintiff class was appropriate and suggested that the district court meet with the parties and the United States to work out the terms of a decree. (Pp. B11-B14, *infra.*)

REASONS FOR GRANTING THE WRIT

The judgment of the court below contemplates that the City of Black Jack will be ordered to take affirmative steps ensuring that multiple-family housing for persons of low and moderate income will be built in the City. There is no official obstacle to the construction of such housing. There has been none since the district court in the United States action entered its sweeping injunction against enforcement of the ordinance and, specifically, in favor of allowing the construction of the Park View Heights project. Black Jack, furthermore, has paid money damages to the developer of that project to recompense it for any loss it may have suffered as a result of Black Jack's violation of the Fair Housing Act.

In the United States action it was established that Black Jack's violation lay in the discriminatory effect of an ordinance that was fair on its face and not motivated by a purpose to discriminate on the basis of race. The ordinance was not held to violate the Constitution and, on the findings made, a constitutional violation could not have been found. An injunction that, in these circumstances, would command Black Jack to take the additional

affirmative steps indicated by the judgment below is unprecedented. The question whether the remedy embodied in that judgment can be ordered against a public body on the authority of nothing more than the general remedial provision of the Fair Housing Act, § 812(c), 42 U.S.C. § 3612(c) (p. 3, *supra*), for an unintended violation of that statute, is a novel and important question of federal law that has not been and should be decided by this Court. The court of appeals' answer to the question is inconsistent with principles established by repeated decisions of this Court: the principle that in our federal system affirmative equitable relief can be ordered against state and municipal bodies only for violations of the Constitution and the principle of respect for state sovereignty enunciated in *National League of Cities* v. *Usery,* 426 U.S. 833 (1976). Those principles, ignored by the court of appeals below, have been recognized by another court of appeals in a situation analogous to this one.

I.

THE QUESTION WHETHER, TO REMEDY AN UNINTENTIONAL VIOLATION OF THE FAIR HOUSING ACT, A COURT MAY ORDER A MUNICIPALITY TO PROVIDE HOUSING UNITS EQUIVALENT TO UNITS WHOSE CONSTRUCTION WAS DELAYED BY THE VIOLATION AND THAT CANNOT NOW BE ECONOMICALLY CONSTRUCTED, IS AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN AND SHOULD BE DECIDED BY THIS COURT.

In the court below, the United States, appearing as an *amicus curiae* in support of the plaintiff class, attested to

the novelty and importance of the question here presented in the administration of the Fair Housing Act, saying at page 2 of its brief:

> "The present appeal raises novel and important questions under the Fair Housing Act, most particularly what, if any, remedy is appropriate where circumstances change so materially during the course of a municipality's unsuccessful defense of discriminatory conduct that the relief initially sought is no longer effective to vindicate plaintiffs' rights."

In today's economy, where construction costs are increasing at phenomenal rates and delay of any building project is therefore potentially costly, the question presented in this case is a significant question indeed. In the passage quoted from the brief of the United States, the significance is stated from the standpoint of the potential beneficiaries of a proposed housing project that falls victim to the passage of time. The significance is no less for a municipality. The strong interest of a municipality in instituting and maintaining land-use policies designed to enhance the quality of its residents' lives has been recognized by the Court from *Village of Euclid* v. *Ambler Realty Co.,* 272 U.S. 365 (1926), to *Village of Belle Terre* v. *Boraas,* 416 U.S. 1 (1974). Its policies must be consistent with the Constitution and any applicable federal statutes, to be sure. But under the decision below, the cost of defending such policies against attack based on a federal statute becomes potentially very high. If the decision below is allowed to stand, municipalities such as Black Jack will be deterred from undertaking the legitimate defense of ordinances enacted in good faith that arguably violate a provision of the Civil Rights Act.

Consider Black Jack's case: In 1970 it enacted, without discriminatory intent, a zoning ordinance that on its face was neutral as respects race. The ordinance was designed to maintain the character of the recently-incorporated community as predominantly a place for single-family dwellers, "a sanctuary for people." *Village of Belle Terre* v. *Boraas,* 416 U.S. 1, 9 (1974). The question whether such an ordinance violates the Fair Housing Act was then open to controversy; it remains so. Indeed, the Eighth Circuit's reasoning in the United States action has been rejected by another court of appeals. In *Resident Advisory Board* v. *Rizzo,* 564 F.2d 126, 148 (3d Cir. 1977), *cert. denied,* 435 U.S. 908 (1978), the Third Circuit referred to and declined to follow *United States* v. *City of Black Jack* in its holding that, under Title VIII of the Civil Rights Act, a municipality must show a compelling governmental interest to justify an ordinance found to have a racially discriminatory effect. The conflict has not been resolved by this Court. More fundamentally, the decision of the court of appeals that the Black Jack ordinance could be invalidated on the basis of discriminatory effect alone has become suspect in the light of intervening decisions of this Court that establish that (1) as enforced against a public body such a statute as Title VIII must find its authority in the Fourteenth Amendment and not in the Commerce Clause and (2) the Fourteenth Amendment covers only purposeful discrimination.[3]

As a result of the determination that its ordinance had a forbidden discriminatory effect, Black Jack was enjoined from enforcing it and directed to take affirmative steps to

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[3] National League of Cities v. Usery, 426 U.S. 833 (1976); Washington v. Davis, 426 U.S. 229 (1976); and Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977). The effect of these cases is discussed at pages 17-20 below.

permit the construction of the Park View Heights project. It paid $450,000 in damages to the developer after it appeared that the project was not going to be built. The court of appeals has now gone further and required Black Jack to provide plaintiffs with some equivalent of the 108 units of housing that the developer is no longer interested in building. By so doing, the court makes the City of Black Jack—and every other city in the United States—the guarantor of any housing project adversely affected by any arguably illegal ordinance it may enact or defend. Facing that prospect, few municipalities will dare risk the perils of runaway inflation, the energy crunch and changing political currents with regard to federal housing subsidies by presenting a good faith and possibly meritorious defense to an ordinance challenged under Title VIII.

At the outset of this discussion we spoke of the cost imposed upon Black Jack by the decision below. The cost is not measured in dollars alone, although the $450,000 in damages is a large sum for a city the size of Black Jack, and, according to the opinion below, the monetary cost may go higher.[4] The real cost lies in the sacrifice of sovereignty that is entailed by the decision, a sacrifice indicated by the suggestions in the court's opinion of how the City could satisfy the plaintiff class' demand for 108 moderate-income dwelling units. These include the adoption of an "inclusionary zoning ordinance,"[5] adoption of

[4] The court of appeals in its current opinion said that Black Jack "does not have the means to build the low and moderate income housing *entirely* on its own" (p. B12, *infra*; emphasis added), leaving open the possibility that the City could be required to pay a substantial portion of the cost of building the housing.

[5] An "inclusionary zoning ordinance" is defined by the court below as one which "would require future land developers to provide a specified percentage of low and moderate income housing units in their developments." (Pp. B11-B12, *infra*.)

"density bonuses,"[6] and establishment of "set-aside" or "override" procedures that "waive some building or zoning requirements for developers of low and moderate income housing." (P. B12, *infra*.) The court suggested that the precise means be determined in a conference of the parties, to which the United States should also be invited. (P. B13, *infra*.) Thus, Black Jack's land-use policies would be determined not by its democratically-elected officials in their own counsels but only after forced consultation with others, under the aegis of a court—and, failing that, by the court itself.

II.

THE DECISION BELOW IS INCONSISTENT WITH DECISIONS OF THIS COURT THAT LIMIT THE POWERS OF FEDERAL COURTS TO INTERFERE IN THE INTERNAL AFFAIRS OF STATES AND THEIR INSTRUMENTALITIES.

No decision of this Court warrants such an intrusion into local ,governmental affairs on the basis of a mere unintentional violation of a statute, even a civil rights statute. Indeed, decisions of this Court make clear that the decision below is wholly unwarranted.

A. No Decision of this Court Supports the Decision Below.

The Court below purported to find authority in *Albermarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975). (Pp. B3-B4, *infra*.) It was mistaken. *Albermarle* involved the question of the permissibility of back pay as a remedy

[6] The court describes "density bonuses" as inducing "developers to provide low and moderate income dwelling units by permitting more dense development of land if such units are included." (P. B12, *infra*.)

for a violation of the employment title, Title VII, of the Civil Rights Act. The Court held that such a remedy was appropriate, even in the absence of an intentional violation on the part of the employer. *Albermarle*, however, is distinguishable in two fundamental respects. First, the remedy there in question—back pay—was specifically provided for in the statute, and the Court's discussion of the legislative history established that back pay was intended as a remedy for the violation that had occurred in the case before it. There is no equivalent statutory provision in Title VIII. There is no evidence that Congress, which in Section 812(c) expressed itself in quite customary remedial terms, meant by that statute to empower courts to force municipalities into the business of providing housing units to replace those that may have been inhibited by an ordinance enacted in good faith and without discriminatory intent.

The second important difference is that the *Albermarle* defendant was a private corporation, whereas here the defendant is a municipality. This Court has held that principles of federalism circumscribe the power of the federal courts to order injunctive relief that interferes with the internal workings of state and local governmental entities. Thus, remedial principles established for civil rights violations by private parties cannot be applied indiscriminately to municipalities such as Black Jack.

B. The Decision Below Is Inconsistent with Decisions of this Court Holding that Affirmative Equitable Relief Against Public Bodies Is Available Only in Cases of Constitutional Violations.

The foundation case for limits on federal injunctions against state instrumentalities is *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16 (1971).

The unanimous Court, speaking through the Chief Justice, held that the power of a district court to grant affirmative injunctive relief against a state or its subdivision is limited to cases in which a constitutional violation is established. "As with any equity case," the Court said, "the nature of the violation determines the scope of the remedy."

The straightforward proposition enunciated in *Swann* has been repeated without qualification in other cases since decided by the Court. *See, e.g., Milliken* v. *Bradley*, 418 U.S. 717, 738 (1974). In *Rizzo* v. *Goode*, 423 U.S. 362, 377 (1976), the Court placed this admonition in its proper context, noting that principles of federalism strongly militate against federal judicial interference with the operation of state and local governments—even where a constitutional violation *is* found. *See also Mayor of Philadelphia* v. *Educational Equality League*, 415 U.S. 605 (1974).

Hills v. *Gautreaux*, 425 U.S. 284, 293 (1976), explicated the principles of *Swann, Milliken* and *Rizzo* by stressing that the power of the federal courts to tamper with the operation of local governments is inherently limited by the nature of the federal system:

> "the Court's decision [in *Milliken*] rejecting the metropolitan area desegregation order was actually based on fundamental limitations on the remedial powers of the federal courts to restructure the operation of local and state governmental entitites. That power is not plenary. It 'may be exercised "only on the basis of a constitutional violation." ' 418 U.S., at 738, quoting *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16. *See Rizzo* v. *Goode*, 423 U.S. 362, 377."

The district court recognized that the lengthy and detailed involvement in the affairs of the City of Black Jack contemplated by the plaintiffs would contravene the mandate of these cases since no constitutional violation had been found. (P. A9, *infra.*) The court of appeals, however, scarcely took account of the issue. It held summarily, in a footnote, that the district court had the power to grant the relief requested. (P. B10, n.5, *infra.*) One cannot know, therefore, what its reasons were for ignoring this Court's explicit admonitions on this point.

The plaintiff class argued below that in all of the cases we have cited the Court meant to do no more than state the truism that equitable relief is available only for unlawful conduct and it just happened that the Constitution was the law that made the conduct unlawful. The argument is difficult to square with the Court's repeated emphasis of the point, an emphasis that would be quite out of proportion to a simple assertion that a party should not be awarded an injunction unless the conduct of his opposing party entitles him to it. In its *amicus* role below, the United States saw this point and, at page 12 of its brief, acknowledged that intentional discrimination such as would amount to a constitutional violation may be a condition to the granting of affirmative injunctive relief. The United States suggested that in the record of its action against Black Jack there was evidence that could have supported a finding of intent to discriminate, and it urged the court to treat such intent as established. That, of course, is as impermissible, given the parties' stipulation, as it would be for Black Jack to ask that the United States

action be readjudicated in the light of the intervening decisions of this Court. (*See* p. 11, *supra.*)[7]

The issue of the consistency of the decision below with *Swann* and the numerous cases in which *Swann* has been followed is squarely presented and should be resolved by this Court.

C. The Decision Below Is Inconsistent with the Principle Underlying *National League of Cities v. Usery.*

The decision below also conflicts with the separate but related doctrine of *National League of Cities* v. *Usery,* 426 U.S. 833 (1976). There the Court held that Congress has no power to interfere with the internal operation of state and local governments by requiring the payment of a minimum wage to state employees. The Court noted that "the federal requirement directly supplants the considered policy choices of the States' elected officials and administrators as to how they wish to structure pay scales in state employment," *id.* at 848, which could "substantially restructure traditional ways in which the local governments have arranged their affairs," *id.* at 849. Since this "would impair the States' 'ability to function effectively in a federal system,'" the Court concluded that "[t]his

[7] The court of appeals did say in a footnote to its opinion in the United States action that there was "evidence in the record to support" the contention of the Government that the Black Jack "ordinance . . . was enacted for the purpose of excluding blacks." It went on to recite some such evidence. But it concluded by saying that "we do not base our conclusion that the Black Jack ordinance violates Title VIII on a finding that there was an improper purpose," 508 F.2d at 1185 n.3, leaving undisturbed the district court's finding that the ordinance was not enacted with a racially discriminatory purpose. (P. 4, *supra.*)

exercise of congressional authority does not comport with the federal system of government embodied in the Constitution." *Id.* at 852.

We have described the extent to which Black Jack's ability to make and carry out its land-use policy choices would be impaired by the decision below. (Pp. 12-13, *supra.*) This interference is significantly greater than the interference disapproved in *Usery.* Under the procedure envisioned by the court below, the power to make important decisions would be taken from the elected officials of the City. Those decisions would have to be made under the pressure of opposing parties and the United States, all under the direction of a district judge, who, if agreement should not be reached, would ultimately make the decisions himself. The decision below would have this effect upon Black Jack of its own force and immediately and would serve as precedent for the same result in the case of any other municipality comparably situated. Because neither Black Jack nor, by hypothesis, any other municipality for whose case the opinion below is precedent has committed a constitutional violation, the power of the court to order this serious intrusion into state autonomy must arise, if at all, from a congressional enactment, Title VIII of the Civil Rights Act. Thus, as in *Usery,* the question is posed whether Congress, acting through the federal courts, may "force directly upon the States its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made." 426 U.S. at 855.

The Fair Labor Standards Act, at issue in *National League of Cities* v. *Usery,* was enacted on the authority of the Commerce Clause. The commerce power is also a

sufficient source of authority for the Fair Housing Act in its application to private parties. The least that *National League of Cities* v. *Usery* means, we submit, is that in its application to the states and their instrumentalities such a statute as the Fair Housing Act cannot be sustained by the commerce power but could be authorized only by Section 5 of the Fourteenth Amendment. The question whether, in the light of *Washington* v. *Davis,* 426 U.S. 229 (1976), and *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.,* 429 U.S. 252 (1977), a statute enacted on the authority of Section 5 can cover non-purposeful discrimination has not been decided by this Court and is presented in cases pending on petitions for certiorari. *City of Anniston* v. *Scott,* No. 79-390; *City of Los Angeles* v. *Blake,* No. 79-54. *Cf. City of Rome* v. *United States,* No. 78-1840, pending decision on the merits (Fifteenth Amendment). The precise question presented in those cases is not open here because of the parties' stipulation to be bound by the outcome of the United States action, even though that result is now subject to serious doubt. However, even if that question is resolved adversely to the petitioning municipalities, the question raised here will remain open—whether, to remedy a statutory violation grounded in discriminatory effect, a court may go beyond invalidation of the offending ordinance and impose affirmative requirements such as those indicated by the judgment below.

It is one thing for Congress, acting under the authority of Section 5 of the Fourteenth Amendment, to limit the legislative choices of local governing bodies by prohibiting laws that have the effect of discriminating. It is quite another for Congress to supplant local autonomy by forcing its own legislative choices upon state and municipal bodies. *Usery* cautions that "there would be little left

of the States' 'separate and independent existence,'" if Congress could dictate the fundamental decisions with respect to the provision of "services such as [those] which the States have traditionally afforded their citizens." 426 U.S. at 851, *quoting Coyle* v. *Oklahoma,* 221 U.S. 559, 580 (1911). We submit that it would violate this fundamental principle of *Usery* if Congress could force municipalities to make policy in meetings held under the direction of a federal judge, separate from their regular city council sessions, as a penalty for having enacted a statute that is later found to have a discriminatory effect. Such interference with local autonomy should be sanctioned, if at all, only if the violation committed by the local entity was purposeful, thus signifying a conscious abdication of its own responsibility under the Fourteenth Amendment.

III.

ANOTHER COURT OF APPEALS HAS RULED THAT IT COULD NOT GRANT THE KIND OF AFFIRMATIVE RELIEF ORDERED BY THE COURT BELOW FOR AN UNINTENTIONAL VIOLATION OF THE FAIR HOUSING ACT.

The principles just discussed, ignored by the court of appeals below, have been recognized by another court of appeals in a similar case. The Court of Appeals for the Sixth Circuit has declared that, in the absence of a constitutional violation, affirmative injunctive relief may not be granted against a municipality. *Garrett* v. *City of Hamtramck,* 503 F.2d 1236 (6th Cir. 1974), was a civil rights action brought by blacks displaced by an urban renewal housing project. The district court held that the state and federal agencies in charge of the project had violated the plaintiffs' statutory and constitutional rights.

The district court then ordered the city to provide housing for individuals displaced by the project. In reviewing this far-reaching relief (relief remarkably similar to that ordered in this case), the Sixth Circuit held that it could be ordered only on the basis of an intentional constitutional violation, and not for a mere statutory violation:

> "The fundamental basis for the district court's disposition of this case lies in its findings of constitutional, not statutory, violations by the defendants. *Only deprivation of constitutional rights would justify the far-reaching remedial provisions of the court's orders.* As the Supreme Court held in *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 16, 91 S.Ct. 1267, 1271, 28 L.Ed.2d 554 (1971), rehearing denied, 403 U.S. 912, 91 S.Ct. 2200, 29 L.Ed.2d 689 (1971), '[T]he nature of the violation determines the scope of the remedy.' Our study of the record in this case leads to the conclusion that the district court correctly found that the City has violated the plaintiffs' right to equal protection of the laws under the Fourteenth Amendment by engaging in activity *intentionally* designed to establish and add to segregation in housing patterns. Such activities have been held to be a constitutional violation. *Gautreaux* v. *Chicago Housing Authority,* 296 F. Supp. 907 (N.D.Ill. 1969); *Hicks* v. *Weaver, supra,* 302 F. Supp. at 623." 503 F.2d at 1247 (emphasis added).

The *Garrett* case, with its explicit emphasis on the difference between statutory and constitutional violations, underscores that the fundamental issue in this case is not

the disagreement between the district court and the court of appeals as to the treatment of supervening events in tort law or as to how foreseeable it was that the Park View Heights project would become economically infeasible by the time the legality of the zoning ordinance was finally adjudicated. (Pp. 6-7, *supra.*) The fundamental issue is whether Congress may subject municipalities to a significant risk that, if their good-faith land-use ordinances are held to violate federal law because of a finding of discriminatory effect, they will be subject to the staggering liability of financing or otherwise providing any housing units that might have been built. Since, in times like these, it can be foreseen that delay of someone's planned project may put the cost of construction out of sight, or may cause the project to run afoul of new federal policies, public bodies must be cautious indeed in implementing good-faith land-use policy decisions for fear of inviting the intrusion into local policy making that Black Jack is now faced with. The decision below thus poses a serious threat to local autonomy by deterring uninhibited, good-faith decision-making at the state and municipal levels.

CONCLUSION

The question whether the affirmative injunctive relief directed by the court below against Black Jack is within the scope of the authority of a court to remedy violations of the Fair Housing Act that do not amount to constitutional violations is a novel and important one. Several lines of this Court's decisions indicate that the question should be resolved against the existence of any such power as was assumed by the court of appeals in ordering Black Jack to take affirmative steps to provide housing that, following the invalidation of Black Jack's zoning ordinance for its discriminatory effect, any entrepreneur, profit-making or charitable, is free to build in the City. This Court should grant the petition and decide the question authoritatively.

Respectfully submitted,

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January 1980

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 71C 15 (A)

THE PARK VIEW HEIGHTS CORPORATION, et al.,
Plaintiffs,
vs.

THE CITY OF BLACK JACK, et al.,
Defendants.

MEMORANDUM OPINION

HARPER, District Judge.

This action is a continuation of *Park View Heights Corp.* v. *Black Jack,* 335 F. Supp. 899, reversed 467 F. 2d 1208 (8th Cir. 1972). The sole issue before the Court is whether, given the established violation of the Fair Housing Act, Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3601 et seq., the remedial injunctive relief requested by the plaintiff class is appropriate.

The jurisdiction of this Court exists pursuant to 28 U.S.C. § 1343 and 42 U.S.C. 3610(d).

The original plaintiffs were two non-profit corporations, the Inter-Religious Center for Urban Affairs, Inc., and Park View Heights Corporation, and eight individual plaintiffs suing as a class. The plaintiffs were determined to have standing to bring this action in *Park View Heights Corp.* v. *Black Jack,* 467 F. 2d 1208 (8th Cir. 1972).

In the prayer of their complaint, plaintiffs requested the Court: To expedite the case; to declare Black Jack's Zoning Ordinance No. 12 unconstitutional and unlawful; to enjoin the defendants from enforcing Zoning Ordinance No. 12; to enjoin defendants from interfering with or obstructing in any way the construction of the Park View Heights Development; to enjoin defendants to affirmatively take whatever steps are necessary to allow construction of the Park View Heights project; to retain jurisdiction until the completion of the Park View Heights project; and to allow plaintiffs their costs herein.

After the filing of this action, the United States, on January 14, 1971, filed a complaint in this Court against the City of Black Jack, *United States* v. *Black Jack,* No. 71C 372. Therein, the United States alleged that the City of Black Jack had engaged in racially discriminatory housing practices in violation of the Fair Housing Act, 42 U.S.C. § 3601 et seq. by exercising its zoning powers to exclude the construction of a federally subsidized housing development for low and moderate income persons. The challenged conduct of the defendant, City of Black Jack, in *United States* v. *Black Jack,* supra, was precisely the same conduct challenged in the instant action. Both cases were based upon the same transactions and occurrences.

By the time the action herein was remanded by the Eighth Circuit Court of Appeals on September 25, 1972, the suit filed by the United States was well along in the discovery stage. To prepare the case at bar for trial at that time would have presented many problems, since the attorneys for the defendants in this action were also the attorneys for the defendant in the case filed by the United States. The attorneys for the parties were in agreement that the trial of this action should be delayed until *United States* v. *Black Jack,* supra, was tried and disposed of in the trial court. After the decision of Judge Meredith on March 20, 1974, in *United States* v. *Black Jack,* 372 F. Supp. 319 (E.D. Mo. 1974), this case was set for trial on September 23, 1974.

On September 19, 1974, the attorneys for the parties in this action stipulated that the action be adjourned until the final disposition in *United States* v. *City of Black Jack* (71C 372[1]). They further stipulated that "should the United States in its capacity as plaintiff in *United States* v. *City of Black Jack* fail to establish that the challenged conduct of the City of Black Jack constitutes a violation or deprivation of rights secured by Title VIII of the Civil Rights Act of 1968 (42 U.S.C. § 3601 et seq.), the Thirteenth Amendment, or the Fourteenth Amendment, with the consent of the Court this action is to be dismissed;" and further, "should the United States in its capacity as plaintiff in *United States* v. *City of Black Jack,* establish that the challenged conduct of the City of Black Jack constitutes a violation or deprivation of rights secured by Title VIII of the Civil Rights Act of 1968 (42 U.S.C. 3601 *et seq.*), the Thirteenth Amendment, or the Fourteenth Amendment, *nothing contained in this stipulation shall prejudice the parties plaintiff in proceeding with this action for the recovery of damages claimed to flow from the violation or deprivation so established." (Emphasis added.)*

The decision of the district judge in the case of *United States* v. *Black Jack* was appealed to the Eighth Circuit Court of Appeals and an opinion was filed by that court on December 27, 1974, 508 F. 2d 1179, *cert. denied* 422 U. S. 1042 (1975). After certiorari was denied by the Supreme Court in *United States* v. *Black Jack, supra,* the cause herein was set for trial on November 10, 1975, and because of discovery problems was reset for trial on January 12, 1976.

In *United States* v. *Black Jack,* the Eight Circuit Court of Appeals determined that Zoning Ordinance No. 12 was shown to have a racially discriminatory effect and was not justified by any compelling governmental interest. It held at 508 F. 2d 1188, "that Zoning Ordinance No. 12 of the City of Black Jack violates Title VIII, because it denies persons housing on the basis of race, in violation of [42 U.S.C.] 3604(a), and interferes with the exercise of the right to equal housing opportu-

nities in violation of [42 U.S.C.] 3617." The Court of Appeals did not, however, find any constitutional violations inasmuch as the action was not brought under the Constitution. *United States* v. *Black Jack, supra,* at 1184.

On December 12, 1975, the plaintiffs in this action filed an amended complaint. In the prayer of their amended complaint, plaintiffs requested the relief sought in their original complaint, plus, plaintiffs, Park View Heights Corporation and Inter-Religious Center for Urban Affairs, Inc., requested money damages in the amount of $1,100,000.00 and such other actual monetary damages as may accrue before final disposition of the case.

On January 9, 1975, pursuant to the mandate of the Court of Appeals in *United States* v. *Black Jack, supra,* this Court, Judge Meredith presiding, entered an order declaring Zoning Ordinance No. 12 to be unlawful under the Fair Housing Act, and thus void. The Court also permanently enjoined the defendant, City of Black Jack, its officers and employees from enforcing Zoning Ordinance No. 12 or exercising any municipal authority for the purpose or with the effect of obstructing the construction of the Park View Heights development. All land zoned for multiple dwelling prior to the incorporation of Black Jack and the enactment of Zoning Ordinance No. 12 was ordered to revert to the zoning classification which existed prior to the city's incorporation. Finally, the Court ordered, "[T]he defendant City of Black Jack shall affirmatively take whatever steps are necessary to permit the construction and occupancy of the proposed Park View Heights Development."

On January 12, 1976 (the trial date in this case), the parties in this action entered into a consent judgment, whereby the defendant, City of Black Jack, would pay damages to the Park View Heights Corporation in the amount of $450,000.00. This consent judgment concluded the controversy between plaintiffs, Inter-Religious Center for Urban Affairs, Inc. and the Park View Heights Corporation, as against the defendants. The consent decree further concluded any claim for damages on

behalf of the plaintiff class. The plaintiff class was not, however, precluded from seeking any further injunctive or declaratory relief—the issue presently before this Court. On January 12, 1972, the plaintiff class was certified by the Court. The class was identified as all individuals of low and moderate income housing who would have been eligible for the Park View Heights project.

The substance of plaintiffs' argument is that the delay involved in adjudicating the validity of Black Jack's Zoning Ordinance No. 12 has resulted in a considerable increase in construction costs to a point where it is not presently feasible to construct the proposed project. Plaintiffs assert that this increased cost could not be recovered without bankrupting the City of Black Jack. Therefore, the plaintiff class has requested some remedial injunctive relief against the defendants to redress its injuries. A trial was held on this matter on December 8, 1976. For the reasons stated below, plaintiffs' request for further injunctive relief will be denied.

Initially it should be noted that the decision contained herein in no way affects, limits or modifies the order of Judge Meredith made on January 9, 1975, in *United States* v. *Black Jack.* That order provides all of the equitable relief that was requested in plaintiffs' complaints. Zoning Ordinance No. 12 has been declared unlawful and void. The defendants are enjoined from enforcing Zoning Ordinance No. 12 or otherwise obstructing the construction of the Park View Heights Development. Judge Meredith's order further requires the defendants to take affirmative action to permit the construction of the project. No legal or governmental impediments by the City of Black Jack exist to prevent the construction of a low income housing development on the land in question. Only the economics of the situation bars construction. It is difficult for this Court to perceive plaintiffs' need for remedial injunctive relief where plaintiffs have never requested such relief in a complaint, and have already received by Judge Meredith's order the equitable relief they did request.

Plaintiffs seek to lay the blame upon the defendants for the adverse economic factors which assertedly bar construction. However, plaintiffs' proof points the other way. The testimony before the Court and the exhibits submitted indicate the cost of the project in November of 1970 to be between $1,381,000 and $1,696,000, exclusive of land costs. Costs of construction in February of 1976 were estimated at $3,085,000. However, other testimony indicated that compliance with new building regulations to meet the Minimum Property Standards of the Department of Housing and Urban Development represented approximately twenty percent of this increase in costs. Other changes in the applicable building codes and the National Electric Code also required additional money to construct. These increases in costs were due to factors which were totally unforeseeable and beyond the control of the City of Black Jack.

Yet, despite the increase in costs, the most significant factor barring construction was the inability to secure an increase in federal subsidies. In 1970, the Park View Heights project had tentatively obtained a mortgage subsidy through the Department of Housing and Urban Development under Section 236 of the National Housing Act. Section 236 of the National Housing Act was enacted by Congress in 1968. It provides for federal assistance in the form of monthly interest reduction payments calculated to reduce the mortgage obligations of the owner of an approved project to the amount that would have been required for principal and interest if the mortgage bore interests at one percent. By 1976 a moratorium was placed on new §236 projects and no additional subsidy could be obtained beyond the original amount set aside by HUD. The discontinuance of §236 programs by HUD was also unforeseeable and beyond the control of the defendants.

Injunctive relief will be refused until the Court is satisfied that the plaintiffs will suffer a substantial irreparable injury brought about by an illegal act by the defendants. *Detroit News Publishing Ass'n* v. *Detroit Typographical Union No. 18,* 471 F. 2d 872, 876 (6th Cir.), *cert. denied* 411 U. S. 967 (1973).

Concededly the necessity of bringing litigation to invalidate the defendants' illegal Zoning Ordinance No. 12 provided an opportunity whereby HUD could add to the building codes and restrict the amount of mortgage subsidy available so as to effectively destroy the construction project. However, equity follows the law. *Burchfield* v. *Evans,* 242 F. 2d 239 (10th Cir. 1957); *Kenyon* v. *Automatic Instrument Co.*, 160 F. 2d 878, 884 (6th Cir. 1947). The law does not hold an actor responsible for injuries resulting from an intervening and independent cause which so interrupts the chain of events as to become the responsible proximate cause, rendering the prior act too remote to operate as the proximate cause. *Morrow* v. *Greyhound Lines, Inc.,* 541 F. 2d 713, 719 (8th Cir. 1976); *Johnson* v. *Serra,* 521 F. 2d 1289, 1292 (8th Cir. 1975). Plaintiffs have cited no cases to this Court wherein a party was held liable for intervening governmental acts which increased costs or reduced subsidies to the plaintiffs. This Court holds that the actions of HUD and some of the other economic factors which have destroyed the feasibility of this project constitute independent intervening causes of plaintiffs injury and are beyond the legal and equitable responsibility of the defendants.

With respect to the relief sought, plaintiffs have made several suggestions to this Court as to the various remedies available. Plaintiffs have proposed *inter alia*: That the defendant City be required to adopt an inclusionary zoning ordinance which would require a certain percentage of all housing development be low and moderate income units, to be built concurrently with other dwelling units; or that the defendant City be required to adopt a density bonus allowing developers to build more densely if low income units are included; or that the defendant City be required to create its own housing authority to develop a "section 8" housing program under 42 U.S.C. § 1437f. Plaintiffs have, however, submitted no evidence as to the feasibility or efficacy of any one of the suggested remedies. This Court has no way of determining whether any of the suggested remedies will achieve the goals desired by

plaintiffs or result in an adverse impact on the surrounding community. A court will refrain from issuing an injunction, "unless the injunction will be effective to prevent the damage which it seeks to prevent." *Humble Oil & Refining Co.* v. *Harang,* 262 F. Supp. 39, 43-44 (E.D. La. 1966); *Great Northern Ry. Co.* v. *Lumber & Sawmill Workers,* 140 F. Supp. 393, 396 (D. Mont.) *aff'd* 232 F. 2d 628 (9th Cir.), *cert. denied* 352 U. S. 837 (1956). Injunctive relief may be denied where the order would work a hardship on third parties. *Middletown Mfg. Co.* v. *Super Sagless Corp.*, 382 F. Supp. 979, 983 (N.D. Miss.), *aff'd* 515 F. 2d 509 (5th Cir. 1975).

Plaintiffs also suggest that the Court defer to the expertise and discretion of local Black Jack officials in choosing and implementing the remedy desired. It is unclear to this Court how such a remedy will be enforceable once ordered. Difficulty of enforcement is in itself often a sufficient reason for denying injunctive relief. *Refrigeration Engineering Corp.* v. *Frick Co.,* 370 F. Supp. 702, 715 (W.D. Tex. 1974); *Automatic Radio Mfg. Co.* v. *Ford Motor Co.,* 272 F. Supp. 744, 749 (D. Mass.), *aff'd* 390 F.2d 113 (1st Cir.); *cert. denied* 391 U.S. 914 (1968).

The power to grant injunctive relief should be exercised sparingly and with great caution, and only where the reason and necessity therefor are clearly established. *Castro* v. *Beecher,* 386 F. Supp. 1281, 1284 (D. Mass. 1975); *Coleman* v. *Aycock,* 304 F. Supp. 132, 140 (N.D. Miss. 1969). For an injunction to issue the right must be clear and the injury impending or threatened so as only to be averted by injunctive relief. An injunction will not be awarded in doubtful cases not coming within well established principles. *Detroit News Publishing Ass'n* v. *Detroit Typographical Union No. 18, supra.* Plaintiffs have not presented such a compelling case so as to clearly warrant the remedial relief requested. The need for further relief has not been clearly established. Further, this Court is reluctant to hold the defendants liable for the vagaries of federal housing codes and subsidies. It is not at all clear that any of the remedies suggested would eliminate the economic

barriers which prevent construction. The project needs additional funding, yet all of the parties have settled their claims for damages by a consent decree.

Even if the above-noted defects in plaintiffs' request for additional relief did not exist, this Court would still be constrained by the fundamental limitations on the equity powers of the Federal courts. The power to grant remedial injunctive relief which interferes with the operation of a local governmental entity is not plenary. It "may be exercised 'only on the basis of a constitutional violation.' " *Hills* v. *Gautreaux*, 425 U. S. 284, 293 (1976); *Milliken* v. *Bradley,* 418 U.S. 717, 738 (1974); *Swann* v. *Board of Education,* 402 U. S. 1, 16 (1971). Such a doctrine is applicable to actions brought under Title VIII of the Civil Rights Act. *Hills* v. *Gautreaux, supra*; *Garrett* v. *Hamtramck,* 503 F. 2d 1236, 1247 (6th Cir. 1974). Thus the power of this Court to issue remedial injunctive relief which interferes with local autonomy in decision-making exists only where a constitutional violation is present. However, no constitutional violation was found in *United States* v. *Black Jack, supra,* and the parties stipulated to be bound by the determination in that action as to whether the challenged conduct of the defendants violated plaintiffs' constitutional rights. In *Garrett* v. *Hamtramck, supra,* at 1247, the court relied upon the constitutional violations found therein, and distinguished the statutory violations, to justify the remedial provisions of the court's order. Statutory violations alone do not constitute a sufficient basis upon which remedial injunctive relief may be granted. Consequently, this Court is without the power to order the remedial injunctive relief requested by plaintiffs.

Accordingly, plaintiffs' request for further injunctive relief will be DENIED.

The Court adopts this memorandum opinion as its findings of fact and conclusions of law and the clerk of the Court is directed to prepare and enter the proper judgment as outlined above.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 78-1660

The Park View Heights Corporation, The Inter-Religious Center for Urban Affairs, Inc.

Barbara Bates, Nancy Billings, Robert Billings, Charlotte French, Jose French, Kermit Guy, Ella Mae Johnson and Raymond Johnson, on their own behalf and on behalf of all others similarly situated,

Appellants,

v.

The City of Black Jack,

Appellee,

Keith J. Barboro, individually and as Mayor of the City of Black Jack, Robert Schuchardt, individually and as Chairman of the Zoning Commission of the City of Black Jack, Herbert Bangert, Mrs. Noah Epley, James Connolley, Harold Evangelista, Joan Kessler, G. Joe Schulte, Albert N. Schroeder and Alden Williams,

The Black Jack City Council,

Appellee,

Gilbert Begeman, Donald Bressler, Judy Henke, Robert Hoyt, William Hunder, Gerald Hutton, Karin Schmiedler, Henry Sewing, George Urlich, Willard Volentine and Clarence Thomas,

The Zoning Commission of
the City of Black Jack,

Appellee.

Appeal from the United States District Court for the Eastern District of Missouri.

Submitted: January 10, 1979

Filed: August 28, 1979

Before LAY, BRIGHT and STEPHENSON, Circuit Judges.

LAY, Circuit Judge.

In 1969, the Inter-Religious Center for Urban Affairs (ICUA) began planning Park View Heights, a racially integrated town-house development under Section 236 of the National Housing Act, 12 U.S.C. § 1715z-1 (1968), which was to be located on an appropriately zoned tract of land in a then virtually all white unincorporated area of St. Louis County, Missouri. The development received preliminary approval from the United States Department of Housing and Urban Development (HUD); however, opposition arose among area citizens, who thereafter took the necessary steps to incorporate a new municipality, named Black Jack. That city became a legal entity in August 1970 and immediately created a planning and zoning commission. In October 1970, Black Jack enacted a zoning ordinance which barred all further apartment construction and made existing apartments non-conforming uses.

In a suit brought by the United States in 1974, this court held enactment of the zoning ordinance had a racially discriminatory effect and the City of Black Jack failed to prove enactment of the ordinance was necessary to promote a compelling governmental interest. *United States* v. *City of Black Jack,* 508 F.2d 1179 (8th Cir. 1974), *cert. denied,* 422 U.S. 1042 (1975).

The Park View Heights Corporation, ICUA, and eight prospective residents of Park View Heights suing as a class, had also brought suit against Black Jack and several of its officials, seeking to invalidate the zoning ordinance. After this court's decision in the suit brought by the United States, plaintiffs Park View Heights Corporation and ICUA amended their complaint to seek relief in damages as well as equitable relief.[1] Trial on the amended complaint was scheduled for January 1976. On

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[1] This court had earlier reversed a district court ruling that the individual plaintiffs and ICUA lacked standing to challenge the ordinance. *Park View Heights Corp.* v. *City of Black Jack,* 467 F.2d 1208 (8th Cir. 1972). On remand the parties stipulated they would be bound by final disposition of the Government's suit, in which the ordinance was found to be illegal.

the proposed trial date, however, a consent judgment was entered under which Black Jack agreed to pay $450,000 in damages to Park View Heights Corporation and ICUA to resolve the controversy. The consent decree precluded any claim for damages on behalf of the class of prospective residents of Park View Heights, but did not prohibit further declaratory or equitable relief on their behalf.

On October 29, 1976, the plaintiff class moved for permanent injunctive relief. It requested defendants be directed "to undertake measures whereby it can reasonably be expected that, within a reasonable time, in the City of Black Jack, there will be available for multi-racial, moderate-income occupancy, at least 108 dwelling units, roughly comparable in size, number of bedrooms, and quality to those which would have been constructed in Phase I of the Park View Heights Project."

On July 10, 1978, the district court denied the plaintiff class any form of relief. *Park View Heights Corp.* v. *City of Black Jack,* 454 F. Supp. 1223 (E.D. Mo. 1978). This appeal followed; we reverse and remand for further proceedings.

Proper Standard For Awarding Equitable Relief.

The plaintiff class contends the appropriate standard to determine the scope of equitable relief for violation of the Fair Housing Act, Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3601 et seq., was set forth by the Supreme Court in *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405 (1975):

> Where racial discrimination is concerned, "the [district] court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Louisiana v. United States,* 380 U.S. 145, 154 (1965). And where a legal injury is of an economic character,
>
> > "[t]he general rule is, that when a wrong has been done, and the law gives a remedy, the compensation shall be equal to the injury. The latter is the standard by which the former is to be measured. The injured party is to be placed, as near as may be, in the situation he would have occupied if the wrong had not been committed." *Wicker v. Hoppock,* 6 Wall. 94, 99 (1867).

Id. at 418-19.

We agree with the plaintiff class that it is entitled to relief which "will so far as possible eliminate the discriminatory effects of the past." *Id.*; *United States* v. *West Peachtree Tenth Corp.,* 437 F.2d 221, 228 (5th Cir. 1971); *United States* v. *Warwick Mobile Homes Estates,* 558 F.2d 194, 197 (4th Cir. 1977). In fashioning equitable relief to eliminate discriminatory effects, courts must be guided by the provisions and purposes of the Fair Housing Act. *Cf. Teamsters* v. *United States,* 431 U.S. 324, 364 (1977) (Title VII); *Albemarle Paper Co.* v. *Moody,* 422 U.S. at 417 (Title VII). The primary objective of Title VIII is, as Vice-President Mondale said, when a Senator, to replace the ghettos "by truly integrated and balanced living patterns." 114 Cong. Rec. 3422 (1968). This objective is one " 'that Congress considered to be of the highest priority,' " *Trafficante* v. *Metropolitan Life Ins. Co.,* 409 U.S. 205, 211 (1972), and in order to achieve it, courts must construe the provisions of Title VIII broadly. *Resident Advisory Bd.* v. *Rizzo,* 564 F.2d 126, 147 (3d Cir. 1977), *cert. denied,* 435 U.S. 908 (1978); *Mayers* v. *Ridley,* 465 F.2d 630, 635 (D.C. Cir. 1972) (en banc); *see also Trafficante* v. *Metropolitan Life Ins. Co.,* 409 U.S. at 211.

Section 812 of the Fair Housing Act, 42 U.S.C. § 3612(c), provides in pertinent part:

> The court may grant as relief, as it deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order, and may award to the plaintiff actual damages and not more than

> $1,000 punitive damages, together with court costs and reasonable attorney fees in the case of a prevailing plaintiff. . . .

Construed broadly, this section gives the district court the power it needs to fashion affirmative equitable relief calculated to eliminate as far as possible the discriminatory effects of violation of the Fair Housing Act.

In fashioning such affirmative equitable relief for civil rights violation, courts are governed by traditional principles of equity. *Teamsters* v. *United States,* 431 U.S. at 374-75. In *Lemon* v. *Kurtzman,* 411 U.S. 192 (1973), Chief Justice Burger wrote:

> [E]quitable remedies are a special blend of what is necessary, what is fair, and what is workable. "Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs." *Brown* v. *Board of Education,* 349 U.S. 294, 300 (1955). Mr. Justice Douglas, speaking for the Court, has said,
>
> > "The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims."
>
> *Hecht Co.* v. *Bowles,* 321 U.S. 329-330 (1944).
>
> See also *Holmberg* v. *Armbrecht,* 327 U.S. 392, 396 (1946).

Id. at 200-01.

With these principles in mind, we now consider the district court's reasons for denying relief.

The District Court Opinion.

At trial, the plaintiff class sought equitable relief on the ground that the City of Black Jack was directly responsible for failure of the Park View Heights project because enactment of the zoning ordinance prevented the construction planned in 1971 and building costs markedly increased during the long litigation, ultimately making construction of the housing project impossible.[2] The district court rejected this contention, finding the City was not responsible for unforeseeable economic factors that came into existence subsequent to enactment of the zoning ordinance and contributed to the increase in construction costs. Chief among these were:

> 1. new building regulations enacted to meet the Minimum Property Standards of HUD;
>
> 2. other changes in applicable building codes and the National Electric Code; and
>
> 3. a moratorium placed on additional mortgage subsidies from HUD under Section 236 of the National Housing Act.

The court went on to hold that:

> The law does not hold an actor responsible for injuries resulting from an intervening and independent cause which so interrupts the chain of events as to become the responsible proximate cause, rendering the prior act too remote to operate as the proximate cause. *Morrow* v. *Greyhound Lines, Inc.,* 541 F.2d 713, 719 (8th Cir. 1976); *Johnson* v. *Serra,* 521 F.2d

---

[2] According to evidence presented by the plaintiff class, the projected contract price in 1970 for construction of the 108 units was $1,381,000. By February 1976, the projected price had risen to $3,085,274.

> 1289, 1292 (8th Cir. 1975). Plaintiffs have cited no cases to this Court wherein a party was held liable for intervening governmental acts which increased costs or reduced subsidies to the plaintiffs. This Court holds that the actions of HUD and some of the other economic factors which have destroyed the feasibility of this project constitute independent intervening causes of plaintiffs injury and are beyond the legal and equitable responsibility of the defendants.

454 F. Supp. at 1227.[3]

Although it is generally said that equity follows the law, we find it somewhat disturbing to believe in this day that equitable relief under the Fair Housing Act to correct racial discrimination is governed by rhetorical application of common law tort principles. Under our analysis of the scope of equitable relief under the Fair Housing Act, assuming the plaintiff class proved that the demise of the Park View Heights project was a discriminatory effect of defendants' violation, intervening economic factors should not be sufficient to relieve defendants of liability, but rather constitute factors affecting the breadth of equitable relief granted. In other words, they are possible factors to be reconciled with the plaintiff class' right to relief. *Lemon* v. *Kurtzman,* 411 U.S. at 200.

The threshold question, then, is whether the plaintiff class established that the demise of the Park View Heights project

---

[3] The plaintiffs and the United States, appearing as amicus curiae, counter with the Restatement of Torts which reads:

> Where the negligent conduct of the actor creates or increases the risk of a particular harm and is a substantial factor in causing that harm, the fact that the harm is brought about through the intervention of another force does not relieve the actor of liability, except where the harm is intentionally caused by a third person and is not within the scope of the risk created by the actor's conduct.

Restatement (Second) of Torts § 442B (1965).

was a discriminatory effect of enactment of the zoning ordinance. Defendants argue vigorously that the plaintiff class did not meet its burden. They argue that the class was made whole by the order entered by Judge Meredith on remand, after this court reversed the lower court ruling upholding the ordinance in *United States* v. *City of Black Jack,* 508 F.2d 1179 (8th Cir. 1974), *cert. denied,* 422 U.S. 1042 (1975). Judge Meredith's January 9, 1975 order reads:

> IT IS HEREBY ORDERED, ADJUDGED, AND DECREED as follows:
>
> 1. So much of Zoning Ordinance No. 12 of the City of Black Jack, enacted on or about October 20, 1970, as purports to change the zoning classification of land previously zoned for multiple-family occupancy is hereby declared to be in violation of the Fair Housing Act of 1968, 42 U.S.C. 3601, et seq., and consequently to be void and unenforceable.
>
> 2. The defendant City of Black Jack, its officers, employees, agents, and successors, and all those in active concert or participation with any of them, are hereby permanently enjoined from
>
> (a) enforcing, implementing, or giving any force or effect to Zoning Ordinance No. 12 of the City of Black Jack, insofar as it purports to affect the zoning classification of land previously zoned for multiple-family occupancy;
>
> (b) exercising any municipal authority for the purpose or with the effect of preventing or impeding the construction or occupancy of the proposed Park View Heights development;
>
> (c) otherwise making any dwelling unavailable to any person because of race, color, religion, sex, or national origin;

(d) otherwise interfering with the exercising or attempted exercise by any person of any right secured by the Fair Housing Act of 1968, 42 U.S.C. 3601, et seq.

3. The defendant City of Black Jack shall affirmatively take whatever steps are necessary to permit the construction and occupancy of the propose [*sic*], Park View Heights Development.

4. In view of the invalidation of the pertinent portions of Zoning Ordinance No. 12 by the decision of the United States Court of Appeals, the classification of all land zoned for multiple-family dwellings prior to the incorporation of Black Jack and the enactment of Zoning Ordinance No. 12 shall, until further order of this Court, revert to the zoning classification existing prior to said incorporation and enactment.

According to defendants, once the zoning ordinance was invalidated, the class was in the legal position it had been in prior to enactment of the ordinance, and was therefore made whole. We cannot agree. There can be no doubt that failure of the Park View Heights project was a direct result of defendants' violation of the Fair Housing Act. The record reflects that in 1970 an option on the land had been acquired and the necessary federal preliminary approval, which included a set-aside of government funds sufficient to finance the projected cost of the project, had been obtained. *United States* v. *City of Black Jack,* 508 F.2d 1182. At the trial, the general contractor for the project, Arthur Monsey, testified that by late 1970, he had arrived at a firm figure of $1,381,000 as the cost of the 108 unit project, was prepared to enter into a contract with the sponsor of the project at that price, and was ready to commence construction in late 1971. On the basis of this evidence, we

think it clear that absent enactment of the discriminatory zoning ordinance, the project would have been constructed as planned.[4]

To ignore this very real effect of defendants' violation would be, as counsel for the United States argues, to leave the plaintiff class "with a 1971 key long after the lock has been changed." It is clear enactment of the zoning ordinance quite predictably delayed any possibility the project would be constructed; the rise in construction costs during the delay was both inevitable and foreseeable. Furthermore, it is obvious the plaintiff class still suffers a significant deprivation because of non-availability of 108 housing units in an integrated setting in St. Louis County.

Under these circumstances, we hold the demise of the Park View Heights project was a discriminatory effect within the provisions and purposes of the Fair Housing Act, and that the district court should not have relieved defendants of liability because of the existence of intervening economic factors.[5]

---

[4] This conclusion is further corroborated by this court's previous observation in *United States* v. *City of Black Jack:*

> Opposition to Park View Heights was repeatedly expressed in racial terms by persons whom the District Court found to be the leaders of the incorporation movement, by individuals circulating petitions, and by zoning commissioners themselves. Racial criticism of Park View Heights was made and cheered at public meetings. The uncontradicted evidence indicates that, at all levels of opposition, race played a significant role, both in the drive to incorporate and the decision to rezone.

508 F.2d at 1185, n.3.

[5] The district court also denied relief because, "[s]tatutory violations alone do not constitute a sufficient basis upon which remedial injunctive relief may be granted." *Park View Heights Corp.* v. *City of Black Jack,* 454 F. Supp. at 1228. We hold this reasoning to be erroneous. The district court has the power to order remedial injunctive relief to redress violations of the Fair Housing Act so long as the relief granted is not more extensive than is necessary to cure the violation. 42 U.S.C. § 3612(c); *Resident Advisory Bd.* v. *Rizzo,* 564 F.2d 126, 149 (3d Cir. 1977), *cert. denied,* 435 U.S. 908 (1978).

As an additional reason for denying relief, the district court held that:

> Plaintiffs have not presented such a compelling case so as to clearly warrant the remedial relief requested. The need for further relief has not been clearly established . . . . It is not at all clear that any of the remedies suggested would eliminate the economic barriers which prevent construction. The project needs additional funding, yet all of the parties have settled their claims for damages by a consent decree.

454 F. Supp. at 1227-28.

We must again respectfully disagree. As we pointed out above, the class has shown it suffers a significant deprivation because of the absence of low cost housing in Black Jack, which is the effect of defendants' discriminatory conduct. Thus the need for further relief has been established.

Remedy.

We hold also that the district court abused its discretion in denying relief on the ground that it was not convinced of the merits of the suggested remedy. The class sought an injunction ordering Black Jack to undertake measures "whereby it can reasonably be expected that, within a reasonable time, in the City of Black Jack, there will be available for multi-racial, moderate-income occupancy, at least 108 dwelling units. . . ." The class intentionally made the wording of the proposed injunction vague, contending that the burden should be placed on the defendants to propose a plan for making 108 units available within a reasonable time. The class did, however, suggest several methods by which Black Jack might accomplish this without expenditure of its own funds. These included: the adoption of an "inclusionary zoning ordinance," which would require future land developers to provide a specified percentage

of low and moderate income housing units in their developments;[6] adoption of "density bonuses," which induce developers to provide low and moderate income dwelling units by permitting more dense development of land if such units are included; establishment of "set-aside" or "override" procedures which waive some building or zoning requirements for developers of low and moderate income housing; and development of a low rent public housing program pursuant to 42 U.S.C. § 1437 et seq., or a Section 8 housing program pursuant to 42 U.S.C. § 1437f.

The court rejected the contention that the burden should be placed on the defendants to propose a suitable remedy. Under the circumstances of this case, we agree that responsibility should be placed on the plaintiff class to come forward with a proposed plan for the construction of housing. Black Jack has already paid $450,000 in damages to Park View Heights Corporation and ICUA. It has no liability in damages to the plaintiff class. It does not have the means to build the low and moderate income housing entirely on its own. However, the district court's rejection of the broad remedy proposed by the plaintiff class should not relieve it of the responsibility of considering other forms of relief requested by the class, or some other equitable alternative.

We remand this case for the district court to further consider the award of equitable relief. It is not the function of this court to determine the equitable relief; under the provisions of 42 U.S.C. § 3612(c) that discretion is vested in the district court. However, for the guidance of the district court and the parties, we set forth the following comments:

1. In exercising its discretion to fashion an equitable remedy, the district court must be ever mindful of the

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[6] This alternative appears more desirable than the density bonuses or "override" procedures, which often tend to become self-defeating. The greater the density, the more difficulty there is in maintaining the project.

important national goals at stake, and must exercise its discretion in light of the purposes of the Fair Housing Act. *Albemarle Paper Co.* v. *Moody,* 422 U.S. at 416-17. The City of Black Jack has violated the Fair Housing Act and has been instrumental in the failure of the Park View Heights project. We can think of no reason why, in order to remedy its violation, the City should not be required to take affirmative steps along with the plaintiff class in its efforts to bring low cost housing to Black Jack.

2. At the same time, however, the district court should not order relief that is more intrusive on governmental functions than is necessary to achieve the goals of the Fair Housing Act. *Resident Advisory Bd.* v. *Rizzo,* 564 F.2d at 149; *United States* v. *West Peachtree Tenth Corp.,* 437 F.2d at 228-29; *United States* v. *Warwick Mobile Homes Estates,* 558 F.2d at 197.

3. In order to devise a remedy for violation of the Fair Housing Act which will not be too intrusive on Black Jack's governmental functions, we suggest the district court meet with both parties and propose joint conferences over a period of time sufficient to allow the parties to reach a definite plan to cooperatively obtain the goal sought. Twice the United States has appeared as amicus curiae; representatives of the United States and HUD should be requested to participate in such conferences. Only upon failure of these conferences should the court undertake to formulate a decree itself.

4. Before any development can take place, there must be land available upon which to build the housing. The court should consider the City's duty to seek out and make land sites available for purchase by the plaintiff class that are properly zoned and so located with reference to public facilities and services as to meet established criteria for low and moderate income family housing.

5. During oral argument before this court, the attorney for the plaintiff class indicated that under appropriate circumstances, the plaintiff class would be willing to undertake the responsibility to find a developer and present a plan to the City of Black Jack for construction of moderate and low income housing. The class has been unwilling to assume this responsibility in part because, as the attorney for the class stated:

> No developer in his or her right mind at this point in time would go into the City of Black Jack and attempt to build low and moderate income housing, . . . because the City of Black Jack has indicated its powerful and abiding hostility to such projects.

Judge Meredith made it clear in his 1975 opinion that Black Jack has the duty to cooperate with the plaintiff class in its efforts to construct low and moderate income housing within the boundaries of Black Jack. This court now seeks on remand of this case to give teeth to that decree. Therefore, no developer should be reluctant to consider a project within the boundaries of the City of Black Jack because of possible local governmental opposition.

We are hopeful that, upon remand of this case, the parties will finally reach a meeting of the minds and put an end to this long and bitterly fought conflict. As costs of construction continue to spiral upward, it becomes more and more difficult to remedy the wrong done to the plaintiff class.

Reversed and remanded.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX C

JUDGMENT

(Filed October 1, 1979)

UNITED STATES COURT OF APPEALS
FOR THE EIGHT CIRCUIT

[CAPTION OMITTED IN PRINTING]

Appellee.

This Cause came on to be heard on the record of the United States District Court for the Eastern District of Missouri and briefs of the respective parties and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed.

And it is further order by this Court that this cause be and is hereby remanded to the said District Court for proceedings consistent with the opinion of this Court.

August 28, 1979

A true copy.

Attest: [Illegible signature]
U.S. Court of Appeals, 8th Circuit.
September 27, 1979

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

[CAPTION OMITTED IN PRINTING]

The Court having considered petition for rehearing en banc filed by counsel for appellees and, being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

October 3, 1979

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI: EASTERN DIVISION

Civil Action
No. 71-C-15(A)

THE PARK VIEW HEIGHTS CORPORATION, et al.,
Plaintiffs,
vs.
THE CITY OF BLACK JACK, et al.,
Defendants.

STIPULATION
(Filed Sep. 19, 1974)

It is hereby stipulated and agreed by and between the attorneys for the parties in the above-styled action that:

(1) With the Court's consent, this action is to be adjourned until the final disposition of *United States* v. *City of Black Jack* (E.D.Mo., East. Div., 71 C 372(1));

(2) Should the United States in its capacity as plaintiff in *United States* v. *City of Black Jack* fail to establish that the challenged conduct of the City of Black Jack constitutes a violation or deprivation of rights secured by Title VIII of the Civil Rights Act of 1968 (42 U.S.C. 3601 *et seq.*) the Thirteenth Amendment, or the Fourteenth Amendment, with the consent of the Court this action is to be dismissed and

(3) Should the United States in its capacity as plaintiff in *United States* v. *City of Black Jack,* establish that the challenged conduct of the City of Black Jack constitutes a

violation or deprivation of rights secured by Title VIII of the Civil Rights Act of 1968 (42 U.S.C. 3501 *et seq.*), the Thirteenth Amendment, or the Fourteenth Amendment, nothing contained in this stipulation shall prejudice the parties plaintiff in proceeding with this action for the recovery of damages claimed to flow from the violation or deprivation so established.

Dated: September 6, 1974

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LAWRENCE G. SAGER
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Attorneys for Plaintiffs

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Attorneys for Defendants

Supreme Court, U.S.
FILED
FEB 4 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1979

No. 79-1043

THE CITY OF BLACK JACK,
A Municipal Corporation, *et al.*,

Petitioners,

—v.—

BARBARA BATES, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-1043

THE CITY OF BLACK JACK,
A Municipal Corporation, et al.,

Petitioners,

v.

BARBARA BATES, et al.,

Respondents.

On Petition For A Writ of Certiorari To The
United States Court of Appeals
For The Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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STATUTE:

Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §3601 et seq. passim

QUESTION PRESENTED

The City of Black Jack has violated Title VIII of the Civil Rights Act of 1968, and in so doing, has caused the demise of the Park View Heights project. The Eighth Circuit Court of Appeals has directed the District Court to supervise settlement negotiations and, if necessary, to enter injunctive relief aimed at redressing the loss of housing opportunity occasioned by the City's illegal and discriminatory conduct. In advance of any order entered against it, and with only the very general and unexceptional guidelines of the Court of Appeals to complain of, the City has sought the review of this Court.

Accordingly, claims about the actual relief which may be granted by the District Court are premature. The only question which presents itself for review at this point is whether, as the City of Black Jack maintains, any form of equitable redress levied against it would be inappropriate, notwithstanding the City's conceded violation of Title VIII of the Civil Rights Act of 1968 and the resulting loss of vital housing opportunity to the plaintiff class.

STATEMENT OF THE CASE

A fair picture of the instant controversy requires that petitioners' statement of the case be augmented in at least four respects.

First, the incorporation of the City of Black Jack and the enactment of Zoning Ordinance No. 12 were the culminating events in a campaign of local opposition to the construction of the Park View Heights project. Responding to uncontroverted evidence to this effect, the Eighth Circuit Court of Appeals has sketched this picture in some detail:

> "In 1969, the Inter Religious Center for Urban Affairs (ICUA) began planning Park View Heights to create alternative housing opportunities for persons of low and moderate income living in the ghetto areas of St. Louis. After a search for an appropriate site, ICUA settled on 11.9 acres on Old Jamestown Road, then in an unincorporated area, but now within the City of Black Jack.
>
> The site was designated for multiple-family structures. An option was obtained on the land, and in March, 1970, the sponsors filed a preliminary application with the Federal Housing Administration for initial approval of a proposed §236 development. The original plans envisioned 108 units comprised of two-story townhouses. Within a month, the proposal became a matter of public

> knowledge, and public opposition was swift and active.
>
> On June 5, 1970, HUD issued a 'feasibility letter,' which amounted to a green light for federal funding, and which was accompanied by a reservation of federal funds for the development. As stated in Park View Heights Corp. v. City of Black Jack, 467 F. 2d 1208, 1211 (8th Cir. 1972):
>
> > 'Upon learning of the "feasibility letter," area residents began a drive to incorporate the area including the site of the proposed Park View Heights apartments. On June 26, 1970, the Citizens for the Incorporation of Black Jack presented two petitions requesting incorporation...to the St. Louis County Council. Between June 26, 1970 and August 6, 1970, the St. Louis County Department of Planning reported to the St. Louis County Council that they "strongly opposed the act of incorporation on fiscal, planning, and legal grounds." Despite this opposition, the St. Louis County Council incorporated the City of Black Jack, Missouri, on

August 6, 1970.

> Between the date of the municipal incorporation and September 15, 1970, the municipal authority of the City of Black Jack was suspended by a Writ of Prohibition issued by a state court. Within six days after the writ was dissolved, the city Zoning Commission issued notices of hearings on a zoning ordinance...'

The ordinance was enacted by the City Council on October 20, 1970. It prohibited the construction of any new multiple-family dwellings and made present ones nonconforming uses." United States v. City of Black Jack, 508 F. 2d 1179, 1182-83 (8th Cir. 1974), cert. denied, 422 U.S. 1042 (1975); See also Park View Heights Corp. v. City of Black Jack, 605 F. 2d 1033, 1035 (8th Cir. 1979) (App. B-2).*/

Second, racial discrimination permeated the campaign against the Park View Heights project at every turn. Contrary to the City's insistence that its conceded violation of Title VIII of the Civil Rights Act of 1968 was "unintentional," and its deeply misleading suggestion that the Eighth

*/ Appendices to the Petition for a Writ of Certiorari are cited as "App. ___."

Circuit concurs in this benign characterization of events (Pet. at 4, 5),*/ the evidence of illicit racial motivation presented to the Court of Appeals was uncontroverted and incontrovertible. In words twice deployed by unanimous panels of the Eighth Circuit:

> "Opposition to Park View Heights was repeatedly expressed in racial terms by persons whom the District Court found to be the leaders of the incorporation movement, by individuals circulating petitions, and by zoning commissioners themselves. Racial criticism of Park View Heights was made and cheered at public meetings. The uncontradicted evidence indicates that, at all levels of opposition, race played a significant role, both in the drive to incorporate and the decision to rezone." Park View Heights v. City of Black Jack, 605 F. 2d 1033, 1038, n. 4 (1979) (App. B-10n.4); United States v. City of Black Jack, 508 F. 2d at 1185, n. 3.

Third, the Court of Appeals has held: (a) that the attempt by the City Black Jack to zone out the Park View Heights project was a violation of Title VIII of the Civil Rights Act of 1968, and (b) that this conduct of the city caused the death of the Park View Heights project. Neither of these propositions is placed in dispute by the petitioners.

*/ Reference to the City's Petition for a Writ of Certiorari are cited as "Pet. at ___."

In United States v. City of Black Jack, supra, the Court of Appeals held that the City of Black Jack had violated Title VIII of the Civil Rights Act of 1968. The petitioners in the case at bar readily concede that they are bound by this holding. (Pet. at 5.) In the decision below, the Court of Appeals further held that the death of the project was the direct result of the City's illegal conduct:

> "...There can be no doubt that the failure of the Park View Heights project was a direct result of defendants' violation of the Fair Housing Act. The record reflects that in 1970 an option on the land had been acquired and the necessary federal preliminary approval, which included a set-aside of government funds sufficient to finance the projected cost of the project, had been obtained. United States v. City of Black Jack, 508 F. 2d 1182. At the trial, the general contractor for the project, Arthur Monsey, testified that by late 1970, he had arrived at a firm figure of $1,381,000 as the cost of the 108 unit project, was prepared to enter into a contract with the sponsor of the project at that price, and was ready to commence construction in late 1971. On the basis of this evidence, we think it clear that absent enactment of the discriminatory zoning ordinance, the project would

> have been constructed as planned." Park View Heights Corp. v. City of Black Jack, 605 F. 2d at 1038 (App. B-9 to B-10).

This finding of the Court of Appeals is not disputed by the petitioners, who introduced no evidence to the contrary at the trial below, and who stress in their petition before this Court that the question of causality is not at issue. See Pet. at 21-22.

Fourth, no injunction against the City has been issued by the District Court, and the Court of Appeals below has done no more than articulate a set of general guidelines (in the Court's own word, "comments") against the backdrop of which settlement negotiations between the parties should proceed, and any ultimate injunctive relief should be measured. See Park View Heights v. City of Black Jack, 605 F. 2d at 1040-41 (App. B-12 to B-14). The City is thus placed in the somewhat awkward position of conjuring up an injunction which might be issued against it (see Pet. at 12, n. 4 and text), and then asking this Court to anticipate and invalidate this figmental order.

REASONS WHY THE WRIT SHOULD BE DENIED

I.

THIS CASE PRESENTS NO ISSUE OVER WHICH THE COURT SHOULD EXTEND ITS DISCRETIONARY REVIEW. THE CLAIMS UPON WHICH THE CITY OF BLACK JACK IS FORCED TO RELY ARE ALTERNATIVELY PREMATURE OR FANCIFUL.

A. The objections of the City of Black Jack to the decision below reduce to the claim that the City will be subjected to unduly burdensome equitable relief at some point in the future or to the claim that no award of equitable relief against the City is appropriate.

This case has narrowed itself to a question of the propriety of an equitable remedy of undefined reach which may be imposed upon the City of Black Jack at some point in the future. That the City acted in violation of Title VIII of the Civil Rights Act of 1968 has been established. That its behavior was the cause of the demise of the Park View Heights Project is not now contested. The only remaining question is thus the ultimate responsibility of the City for the equitable redress of its illegal conduct. While the decision below plainly contemplates the possibility that the City of Black Jack may become the object of injunctive relief on behalf of the plaintiff class, it does so only in the most general of terms.

The Court of Appeals premised its decision upon an unexceptional and unobjectionable standard for the awarding of equitable relief against the City, borrowed directly from this Court's decision in Albemarle Paper Co. v. Moody, 422 U.S. 405, 418-419 (1975):

> "Where racial discrimination is concerned,'the [district] court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future.' Louisiana v. United States, 380 U.S. 145, 154 (1965). And where a legal injury is of an economic character,
>
> > '[t]he general rule is, that when a wrong has been done, and the law gives a remedy, the compensation shall be equal to the injury. The latter is the standard by which the former is to be measured. The injured party is to be placed, as near as may be, in the situation he would have occupied if the wrong had not been committed.' Wicker v. Hoppock, 6 Wall. 94, 99 (1867)."

See also International Brotherhood of Teamsters v. United States, 431 U.S. 324, 367 (1977). Franks v. Bowman Transportation Co. 424 U.S. 747, 763 (1976).

This invocation of a well-settled federal civil rights equitable tradition seems all but beyond dispute. Indeed, the City itself does not appear to take issue with the general application of this uncontroversial standard of relief.

It is unclear precisely on what grounds the City of Black Jack can or does object to the terms of so general and unprovocative a statement of its equitable obligation. Logically, however, the City's claim before this Court must reduce to one or both of these propositions: (1) the City will be required to bear an excessive and unfair burden as a result of the equitable relief to which it may be exposed, or (2) any equitable relief ordered against the City would be inappropriate.

The claim that the City will be asked to bear an excessive burden is simply and irreducibly premature. The claim that any equitable command to the City will be inappropriate is unsustainable. Each of these observations will be amplified briefly in the discussion which follows.

B. The claim that the City may be subjected to unduly burdensome equitable relief is premature.

In reversing the District Court's denial of relief, the Eighth Circuit did not fashion a specific and concrete decree, defining the precise nature of the City's equitable obligations. Rather the Court of Appeals remanded this matter to the trial court for further proceedings with the

ultimate goal of developing an appropriate remedial plan. In doing so, the Eighth Circuit's opinion suggests certain considerations that might be taken into account by the parties and by the trial court. But, at this interval in the litigative process, no concrete equitable decree has been fashioned or even shaped in broad outline.

The City is thus asking this Court to review a remedial plan that has not yet been developed and has not been given textual life as part of an equitable decree. Yet the City petitions this Court on the principal grounds that the kind of "affirmative" relief required of it by the Eighth Circuit's decision is prohibitively costly and unduly intrusive into its municipal affairs. There is, of course, no conceivable way for this Court to evaluate these claims in the abstract.

Under these circumstances, the extension of this Court's discretionary jurisdiction to these claims would be inappropriate. For in their present posture, petitioners' claims lack the concreteness and specificity which would allow the Court to render an informed judgment. As this Court noted in an analogous context: "Passing upon the possible significance of a broad statute in advance of efforts to apply the separate provisions is analogous to rendering an advisory opinion upon a statute or a declaratory judgment upon a hypothetical case." Watson v. Buck 313 U.S. 387, 402 (1941).

C. The proposition that the federal courts suffer a constriction of their remedial authority when they are acting pursuant to civil rights legislation is unsupportable.

In an effort to provide a basis for its claim that no equitable redress can be demanded of it under Title VIII of the Civil Rights Act of 1968, the City advances a somewhat remarkable vision of the interplay of legislative and judicial authority. Under the City's view, when the federal courts fashion equitable remedies for constitutional violations they are free to order vigorous equitable relief against municipalities, but when specifically authorized to issue equitable relief for violations of congressionally defined civil rights, federal courts suffer a constriction of their power to act. See Pet. at 13-17. Such a view, of course, stands the traditional understanding of the play of federal legislative and judicial authority on its head. Pursuant to that understanding, the power of the federal judiciary to fashion remedies is most strained when the courts are forced to act without congressional direction or support. See, e.g., Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971); and Bell v. Hood, 327 U.S. 677 (1946). In contrast, the power of Congress to shape civil rights remedies is plenary and potent. See, e.g., Katzenbach v. Morgan, 384 U.S. 641 (1966); and Fitzpatrick v. Bitzer, 427 U.S. 445 (1976).

Not surprisingly, when the federal courts have found violations of federal civil rights statutes like Title VIII of the

Civil Rights Act of 1968, which authorize a broad range of relief, they have responded with great remedial vigour. See Franks v. Bowman Transportation Company, 424 U.S. 747 (1976); Albemarle Paper Company v. Moody, supra; Moore v. Townsend, 525 F. 2d 482 (7th Cir. 1975); United States v. West Peachtree Tenth Corp., 437 F. 2d 221 (5th Cir. 1971).

This vigour has been every bit as great where it is local governments which have acted in violation of Congress' civil rights enactments. See, Lau v. Nichols, 414 U.S. 563 (1974); Firefighters Institute v. City of St. Louis, 588 F. 2d 235 (8th Cir. 1978); cert. denied, ___U.S.___, 99 S. Ct. 3096 (1979); Resident Advisory Board v. Rizzo, 564 F. 2d 126 (3d Cir. 1977), cert. denied, 435 U.S. 908 (1978); United States v. City of Chicago, 549 F. 2d 405 (7th Cir.), cert. denied, 434 U.S. 875 (1977); Horry County v. United States, 449 F. Supp. 990 (D.D.C. 1978).

D. Black Jack's invocation of National League of Cities v. Usery lacks analytical foundation.

The City's reliance on National League of Cities v. Usery, 426 U.S. 833 (1976), is based on a line of argument which runs as follows: (1) Black Jack might eventually be required to alter its zoning laws in response to an injunction issued by the District Court; (2) one of the areas of traditional municipal authority is land use planning; and (3) therefore, such an injunction would violate the Usery prohibition. Even setting aside the utter prematurity of this claim, it is hard to

imagine a less hospitable set of circumstances for the invocation of the Usery doctrine.

By its terms, the Usery decision is restricted to exercises of Congress' commerce clause powers, while the case at bar concerns the enforcement of a civil rights enactment. See, e.g., 426 U.S. at 852, n. 17. Were Usery so easily transposed from commerce clause exercises of congressional authority to civil rights enactments, from plenary legislative standards to remedies for illegal discrimination, and from broad budget-implicating labor standards to narrow adjustments in ongoing municipal regulations, the case would provide an effective means of preventing Congress and the federal courts from authorizing any civil rights remedies at all. Conferring such breadth on the Usery principle is analytically unsupportable.

II

THERE IS NO CONFLICT BETWEEN THE DECISION BELOW AND THE DECISIONS OF THIS COURT OR THOSE OF ANY COURTS OF APPEALS.

In an effort to demonstrate that the imposition of anticipated equitable relief upon the City of Black Jack places the court below in conflict with the decisions of this Court and at least one decision of the Sixth Circuit Court of Appeals, the City seizes upon a phrase first used by this Court in Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971). In Swann, this Court stated that "the power of a district court to grant affirmative injunctive relief against a State or its subdivision is limited to cases in which a constitutional violation is established." 402 U.S. at 16. This language was subsequently repeated in other decisions of this Court, and in a decision of the Sixth Circuit Court of Appeals. See Hills v. Gautreaux, 425 U.S. 284 (1976). Milliken v. Bradley, 418 U.S. 717 (1974); Rizzo v. Goode, 423 U.S. 362 (1976); and Garrett v. City of Hamtramck, 503 F. 2d 1236 (6th Cir. 1974).

The City's reliance on this language takes it badly out of context. In Swann this Court was merely indicating that the federal courts could issue equitable relief in school desegregation cases only after establishing the existence of unlawful conduct; and, since no independent statutory civil rights claim was involved, it was natural but without significance that this Court spoke in terms of the Constitution.

See 402 U.S. at 16.

Likewise, in Milliken, Gautreaux, and Rizzo, this Court was stressing that municipalities or municipal officials could be made subject to equitable remedies only upon a finding that these entities or officials were themselves guilty of illegal conduct. The nature of the claims in those cases made it natural for the Court to reiterate the language of Swann, but again, the choice of words was without the significance which the City of Black Jack chooses to read into it. Finally, in Garrett v. City of Hamtramck, supra, the Sixth Circuit Court of Appeals cited the statement from Swann, in dicta, to underscore the serious constitutional violation upon which the case actually turned and for which relief was being authorized. In the Hamtramck case, a case filled with a welter of legal claims, including state law claims erroneously heard as an extension of the District Court's pendent jurisdiction, the Sixth Circuit quoted from Swann merely to stress the centrality of the federal constitutional issue. See 503 F. 2d at 1246-47.

In sum, the proposition for which petitioners cite Swann, Milliken, Gautreaux, Rizzo, and Hamtramck--that the equitable authority of the federal courts is drastically curtailed when remedying violations of statutory, as opposed to constitutional proscriptions--was neither raised nor addressed in any of those cases.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari, in the above-styled matter, should be denied.

Respectfully submitted,

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No. 79-1043

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

THE CITY OF BLACK JACK,
A Municipal Corporation, *et al.*,

Petitioners,

v.

BARBARA BATES, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONERS' REPLY MEMORANDUM

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Respondents' principal contention is that the petition is premature. In advancing the contention, they are deceptively bland in their description of the court of appeals' judgment. Thus, in their statement of the question presented, they say that the court of appeals "has directed the District Court to supervise settlement negotiations and, if necessary, to enter injunctive relief aimed at redressing the loss of housing opportunities occasioned by the City's illegal and discriminatory conduct" and that the question

presented "is whether . . . any form of equitable redress levied against [petitioners] would be inappropriate." (Br. in Opp. 1.)

The fact is that "equitable redress" has been "levied" against Black Jack already. It was a form of equitable redress that is traditional where a statute or ordinance has been found repugnant to federal law. Black Jack has been ordered not to enforce its zoning ordinance and, beyond that, has been specifically ordered to take necessary steps to permit construction of the Park View Heights project. (Pet. App. B8-B9.) What respondents sought below, and what the court of appeals granted, is something far more than this traditional equitable redress. It is an order to take affirmative action to provide housing units to substitute for the units that the developers no longer find it worth their while to construct. That is the gist of the court of appeals' guidelines, and in this respect they are not "unexceptional," as respondents would have it (Br. in Opp. 1), but unprecedented, as we have explained in the petition.

We pointed out in the petition (pp. 12-13) that, under the court of appeals' judgment, the proceedings on remand will necessarily entail a sacrifice of the City's sovereignty. The court below "suggested" that the City meet with the respondents, the district judge and perhaps representatives of the United States government to work out the means of providing 108 units of housing in the city; these are not mere "settlement negotiations," as the respondents characterize them. Alternatively, if these joint conferences should not prove fruitful, the district court is

commanded to enter a decree appropriate to achieve that goal. However, if petitioners' contentions are sound, neither of these alternatives is permissible. Any decree entered against the City—whether it be the fruit of judicially compelled conferences or by court order—will impair the City's autonomy and deprive it of the power to determine its land-use policies according to its normal political process. Under the court of appeals' judgment this sacrifice of sovereignty cannot be avoided on remand.

The important question presented therefore cannot be deferred on the ground of its prematurity. Only review by this Court now can avoid the consequences we have mentioned.

Only a few other points in the brief in opposition merit reply.

1. Respondents quite understandably try to paint Black Jack and its officials as villains who acted deliberately to discriminate against them. (Br. in Opp. 2-5.) Their quotations from opinions of the court of appeals should not be allowed to obscure what was actually decided in the United States action. The district court resolved conflicting evidence by concluding that the zoning ordinance was *not* enacted for the purpose of excluding blacks from the community (see Pet. 4 & n.1) and, on the basis of a thorough review of the evidence, some of which it cited in its opinion, the court of appeals expressly declined to find purposeful discrimination (*id.* at 4, 5, 17 n.7). By their stipulation (Pet. App. E1-E2) respondents claimed the benefits of the judgment in the United States action, the only action in which the legality of

Black Jack's conduct has been tried, if it was favorable. It was favorable, and they have acted to secure the benefits. They are bound also to accept the limitations of the source of the benefits, one of which is that it posits a statutory, not a constitutional, violation on a finding of unintended discriminatory effect.

2. As they did below, respondents rely upon cases such as *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975), for the proposition that federal courts may grant affirmative relief against a municipality for non-intentional violations of the Civil Rights Act. (Br. in Opp. 12-13.) However, as noted in the petition, at pages 13-14, these cases involved discrimination by private parties, and no opinion of this Court deals specifically with the question whether such relief may be had against a municipality. The Court's admonitions concerning the special deference to be accorded to municipalities by federal courts establish at the very least that the result in the municipality's case does not follow ineluctably from the result in the private party's case.

3. Respondents argue here just as baldly as in the court of appeals (Pet. 16) that, when this Court said in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), and cases following it (see Pet. 14-17) that a constitutional violation is required before a federal court may grant affirmative injunctive relief against a public entity, it did not mean that but meant to say merely that an injunction may be issued only against someone who has violated or threatens to violate some law. (Br. in Opp. 15-16.) At least one court of appeals has concluded otherwise, despite respondents' unconvincing

effort to explain away the opinion in *Garrett* v. *City of Hamtramck*, 503 F.2d 1236 (6th Cir. 1974) (Pet. 20-21; Br. in Opp. 16). Only this Court can speak authoritatively as to what it meant.

4. At page 12 of their brief in opposition, respondents misstate the issue and the burden of petitioners' argument. Petitioners are clearly not arguing, as respondents would have it, that the federal courts have greater authority to act without specific congressional authorization than with it. Rather, petitioners submit that Congress may not empower a federal court to order affirmative injunctive relief against a municipality in the absence of an intentional, *i.e.*, a constitutional, violation.

While petitioners agree with the brief in opposition that the power of Congress to shape civil rights remedies is "potent," respondents overstate the case when they label such power "plenary." It is not heretical—and it does not "stand[ ] the traditional understanding of the play of federal legislative and judicial authority on its head"—to suggest that Congress may have more power to authorize equitable relief where a state entity has committed a constitutional violation than where it has not.

CONCLUSION

The importance of the question presented is undeniable and scarcely denied by respondents, who demonstrate only that on the merits it can be debated. The question is presented now; the petition is not premature. It should be granted.

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